

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

NATIONAL LABOR RELATIONS BOARD,	:	
	:	
Applicant,	:	
	:	
v.	:	Civil No. _____
	:	
ALARIS HEALTH AT HAMILTON PARK,	:	
	:	
Respondent.	:	Motion Day: April 6, 2020

BRIEF IN SUPPORT OF MOTION OF THE
NATIONAL LABOR RELATIONS BOARD FOR ORDER
ENFORCING ADMINISTRATIVE SUBPOENAS

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BACKGROUND

The National Labor Relations Board (Board), an administrative agency of the Federal Government, moves for an order requiring compliance with an administrative subpoena *duces tecum* and an administrative subpoena ad testificandum served on Respondent Alaris Health at Hamilton Park (Alaris Hamilton), and submits this brief in support of that application.

The relevant facts concerning Alaris Hamilton's failure to produce documents and a list of witnesses in response to the administrative subpoenas issued by the Board are set forth in paragraphs 1 through 14 of the Board's Notice of Motion and exhibits attached thereto, and are incorporated herein. As detailed in the Notice of Motion (at ¶ 4), the Board issued subpoenas in pursuit of securing compliance with a judgment rendered by the United States Court of Appeals for the Third Circuit. That judgment, which enforces a Decision and Order of the Board, requires Alaris Hamilton to remedy its violations of the National Labor Relations Act (the Act), as amended, 29 U.S.C. §§ 151-169, by, among other things, furnishing "in a timely manner" requested information to the Union.

In accordance with its responsibility for investigating whether Alaris Hamilton has complied with the judgment, the Board's Contempt Compliance and Special Litigation Branch (CCSLB) attempted to obtain voluntary production of documents and testimony from Alaris Hamilton which would shed light on its efforts (if any) toward "timely" compliance with the judgment, and the individuals involved in those efforts.

Receiving no response from Alaris Hamilton, CCSLB served it with two administrative subpoenas, seeking documents it failed to produce voluntarily and to depose an appropriate representative of the company as to its compliance efforts. Alaris Hamilton has failed, despite multiple reminders, to produce the requested documents or set a date and time for the deposition. Accordingly, the Board moves for enforcement of its subpoenas.

ARGUMENT

A. THIS COURT HAS SUBJECT-MATTER JURISDICTION TO GRANT THE BOARD'S APPLICATION FOR SUBPOENA ENFORCEMENT.

Section 11(1) of the Act, 29 U.S.C. § 161(1), grants statutory authority to the Board for the exercise of subpoena power. That section states, in part:

The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. *The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpoenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceedings or investigation requested in such application.*

Id. (emphasis added); see *NLRB v. N. Bay Plumbing, Inc.*, 102 F.3d 1005, 1008 (9th Cir. 1996); *Perdue Farms, Inc., Cookin' Good Div. v NLRB*, 144 F.3d 830, 834 (D.C. Cir. 1998); *NLRB v. Carolina Food Processors*, 81 F.3d 507, 511 (4th Cir. 1996).

The United States district courts have jurisdiction to order enforcement of Board administrative subpoenas by virtue of Section 11(2) of the Act (29 U.S.C. § 161(2)). That section states, in part:

In case of contumacy or refusal to obey a subpoena issued to any person, any district court of the United States . . . within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question

Id.; see *N. Bay Plumbing*, 102 F.3d at 1008; *NLRB v. U.S. Postal Serv.*, 790 F. Supp. 31, 33 (D.D.C. 1992).

Alaris Hamilton operates a nursing home and rehabilitation center in Jersey City, New Jersey, which is within this judicial district. (App. at ¶ 2.) Accordingly, this Court has jurisdiction under Section 11(2) of the Act to order Alaris Hamilton's compliance with the Board's subpoenas, which was properly served on it.¹

B. THE BOARD'S APPLICATION HAS APPROPRIATELY BEEN MADE BY MOTION.

The Board's subpoena enforcement proceedings, authorized by Section 11(2) of the Act, are summary in nature. *See N. Bay Plumbing*, 102 F.3d at 1007; *NLRB v. Frazier*, 966 F.2d 812, 817 (3d Cir. 1992). Section 11(2) specifically authorizes the Board to make an "application" to the district courts for a summary disposition on the sole issue of whether or not to enforce the subpoenas.

It is well established that in a Section 11(2) enforcement case, the district court should treat the Board's application as a dispositive

¹ Section 102.4 of the Board's Rules and Regulations, 29 C.F.R. § 102.4, provides "[s]ubpoenas must be served upon the recipient personally, by registered or certified mail, by leaving a copy at the principal office or place of business of the person required to be served, by private delivery service, or by any other method of service authorized by law." Service was effected when the Board sent a copy of the subpoena to Alaris Hamilton by certified mail; United States Postal Service tracking shows that the subpoena was received on February 3, 2020. [Exhibit F.]

matter, and not as a pre-trial discovery matter. *Frazier*, 966 F.2d at 817-18, *see also EEOC v. Fed. Express Corp.*, 558 F.3d 842, 848 (9th Cir. 1996).² For, as the Third Circuit has recognized, “otherwise, the enforcement proceedings may become a means for thwarting the expeditious discharge of the agency's responsibilities.” *NLRB v. Interstate Dress Carriers, Inc.*, 610 F.2d 99, 112 (3d Cir. 1970). “[T]he question of whether or not to enforce the subpoena is the only matter before the court. The court’s decision seals with finality the district court proceeding and is subject to appellate review.” *Frazier*, 966 F.2d at 818.³

² The Equal Employment Opportunity Commission’s statutorily-defined procedure for issuing and enforcing subpoenas, 42 U.S.C. § 2009e-9, incorporates by reference the Board’s statutorily-defined procedure at 29 U.S.C. § 161. Accordingly, decisions interpreting one statute’s subpoena provisions have precedential impact upon the other’s. *See EEOC v. Children’s Hosp. Med. Ctr.*, 719 F.2d 1426, 1430 (9th Cir. 1983) (en banc).

³ Because a subpoena enforcement proceeding is an expedited application for a final court order, the position of the Board is that referral of such matters to a magistrate judge is not appropriate. See 28 U.S.C. § 636(c) (requiring consent of parties to permit magistrate judge to enter final judgment in a civil case); cf. *EEOC v. Schwan’s Home Service*, 707 F. Supp. 2d 980, 984-86 (D. Minn. 2010) (enforcement of subpoena referred to magistrate, then had to be reviewed de novo, resulting in 16-month delay in enforcement).

The Act relieves the Board of any obligation to issue process to commence a subpoena enforcement proceeding. Section 11(2) specifically provides that a subpoena enforcement proceeding is commenced by an application, not by a complaint. As explained long ago by the Sixth Circuit in *Goodyear Tire & Rubber Co. v. NLRB*, 122 F.2d 450 (6th Cir. 1941), a case challenging the Board’s failure to serve a summons and complaint in a subpoena enforcement proceeding,

the proceedings plainly are of a summary nature not requiring the issuance of process, hearing, findings of fact, and the elaborate process of a civil suit. We think the procedure to be followed in the district court is controlled by Section 11(2) of the Act . . .

. . .

It is significant that the statute calls for an “application” rather than a petition, for an “order” rather than for a judgment, and that it details no other procedural steps. Obviously, if the enforcement of valid subpoenas, the issuance of which is a mere incident in a case, were to require all of the formalities of a civil suit, the administrative work of the Board might often be subject to great delay. We think that such was not the intention of Congress, and that this clearly was indicated by the use of the simple and unambiguous words with which it described this proceeding.

Id. at 451; *see* Fed. R. Civ. P. 81(a)(5) (providing that the Federal Rules of Civil Procedure apply to subpoena enforcement proceedings “except as otherwise provided by statute, by local rule, or by court order in the proceedings”).

Accordingly, as this Court's ECF procedures make clear, the application for enforcement of a subpoena is to be made by motion rather than by summons and complaint, and the Board has proceeded accordingly.

C. ALARIS HAMILTON IS ESTOPPED FROM CHALLENGING THE VALIDITY OF THE SUBPOENAS.

Alaris Hamilton failed to petition the Board to revoke the subpoenas as provided by Section 11(2) of the Act and as explained on the face of the subpoenas. Having failed to exhaust available administrative remedies with respect to the subpoenas, Alaris Hamilton is precluded from challenging the subpoenas before this Court. *See NLRB ex rel. United Food & Commercial Workers Int'l Union v. Fresh & Easy Neighborhood Mkt., Inc.*, 805 F.3d 1155, 1162-63 (9th Cir. 2015); *Maurice v. NLRB*, 691 F.2d 182, 183 (4th Cir. 1982); *Am. Motors Corp. v. FTC*, 601 F.2d 1329, 1332-1337 (6th Cir. 1979); *NLRB v. Frederick Cowan & Co.*, 522 F.2d 26, 28 (2d Cir. 1975).

D. THE SUBPOENAS TO ALARIS HAMILTON SATISFY APPLICABLE REQUIREMENTS.

Even if Alaris Hamilton's failure to petition to revoke the subpoenas had not forfeited its right to judicial review, no meritorious defense would be available. Subpoenas issued by the Board are subject to limited judicial review. "A district court should enforce an agency

subpoena if the subpoena is for a proper purpose, the information sought is relevant to that purpose, and statutory procedures are observed.” *Frazier*, 966 F.2d at 815 (citing *United States v. Powell*, 379 U.S. 48, 57–58 (1964); *see also Interstate Dress Carriers*, 610 F.2d at 111 (citing *NLRB v. Kingston Trap Rock Co.*, 222 F.2d 299, 301-02 (3d Cir. 1955)).

1. *The Board is authorized to issue subpoenas duces tecum to investigate efforts to comply with an enforced Board order.*

Under Section 10 of the Act, 29 U.S.C. § 160, the Board is tasked with the prevention of unfair labor practices by issuing complaints, conducting hearings, issuing orders, and seeking enforcement of its orders in circuit courts of appeals. Congress granted to the Board and its agents broad investigatory authority, including the power to subpoena any evidence “that relates to any matter under investigation or in question.” 29 U.S.C. § 161(1); *see also NLRB v. Interstate Material Corp.*, 930 F.2d 4, 6 (7th Cir. 1991) (describing the Board’s broad Section 11 powers). Moreover, the Board’s subpoena power extends to all aspects of the Board’s processes, including the investigation of compliance with the Board’s enforced orders. *Id.*; *accord NLRB v. Steinerfilm, Inc.*, 702 F.2d 14, 15 (1st Cir. 1993).

In the present case, the Board is investigating Alaris Hamilton's compliance with a May 8, 2019 judgment of the Third Circuit enforcing a Board order issued on May 14, 2018. In furtherance of this investigation, after Alaris Hamilton ignored CCSLB's attempts to obtain voluntary compliance with its request for evidence, the Board issued subpoenas to it, seeking information to help CCSLB assess its overall compliance with the Third Circuit's judgment, as well as to determine the company agents responsible for such compliance and ascertain whether those individuals have exercised reasonable diligence in doing so. Section 11 of the Act provides the Board with this investigatory authority.

2. The information sought is relevant to the investigation into Alaris Hamilton's efforts to comply with the Third Circuit's judgment.

Under the broad relevancy standard of the Act's Section 11, the Board has "access to virtually any material that might cast light on the allegations against the employer." *EEOC v. Union Pac. R.R.*, 867 F.3d 843, 852 (7th Cir. 2017) (internal quotation marks omitted) (quoting *EEOC v. Shell Oil*, 466 U.S. 54, 68-69 (1984)). This principle applies with equal force to the investigation of compliance with the Board's orders. *Interstate Material*, 930 F.2d at 6. Courts will defer to an

agency's appraisal of relevancy, which "must be accepted so long as it is not obviously wrong." *In re McVane*, 44 F.3d 1127, 1135 (2d Cir. 1995) (internal quotation mark omitted) (quoting *Resolution Tr. Co. v. Walde*, 18 F.3d 943, 946 (D.C. Cir. 1993)).

The information sought pursuant to the subpoenas is unquestionably relevant to the Board's investigation. The Board seeks evidence relevant to determining the nature of Alaris Hamilton's efforts to make the production mandated by the Third Circuit, and the person or persons responsible for achieving compliance.

3. *The scope of the subpoenas is appropriate and not too indefinite or excessive.*

The requirement that a subpoena not be too indefinite demands that the evidence sought be "described with sufficient particularity." *NLRB v. G.H.R. Energy Corp.*, 707 F.2d 110, 113 (5th Cir. 1982).

However, as noted above, Alaris Hamilton has waived any objection to the scope or burdensomeness of the subpoena by failing to petition to revoke it.

In any event, the Board's subpoena to Alaris Hamilton seeks clearly identifiable information regarding its obligations arising from the judgment, the extent of Alaris Hamilton's compliance with those

obligations, and the steps taken by its agents to achieve compliance.

The subpoena duces tecum seeks documents covering an exceedingly narrow topic and, by its terms, encompasses only the post-judgment period of time in which Alaris Hamilton's conduct may be contumacious.

The subpoena ad testificandum merely seeks Alaris Hamilton's testimony as to its compliance efforts.

In short, the Board's compliance investigation is legitimate, the information sought by the subpoena is described with particularity, and the information is relevant to assessing Alaris Hamilton's efforts to comply with the Third Circuit judgment enforcing an order of the Board. Accordingly, Alaris Hamilton should be ordered to fully obey the subpoena issued to it by providing the Board with the requested documents and answers to interrogatories.

E. THE BOARD IS ENTITLED TO COSTS AND ATTORNEY FEES.

Finally, because Alaris Hamilton has flouted its obligations to abide by government investigative subpoenas for no legitimate reason, the Board should be awarded the costs and attorney fees incurred in preparing the instant application.

First, as regards costs, Fed. R. Civ. P. 54(d) makes an award of costs presumptively appropriate with any civil judgment, unless the court orders otherwise. There is no reason to do so here given the complete lack of merit of Alaris Hamilton's position.

As for attorney fees, there are two bases upon which to award such fees. First, Fed. R. Civ. P. 81(a)(5) makes the Federal Rules of Civil Procedure generally applicable in subpoena enforcement proceedings except where statute, rule or court order dictate otherwise, and the Federal Rules provide for the *mandatory* award of attorney fees against a party which fails to respond to discovery without substantial justification for doing so. Fed. R. Civ. P. 37(d)(3); *accord* Fed. R. Civ. P. 37(a)(5) (mandatory award of attorney fees for failure to answer questions or produce documents and things). As numerous courts have found, these rules authorize like awards in the context of failure to comply with an administrative subpoena. *NLRB v. D.N. Callahan*, No. 18-mc-879, 2018 WL 4190153, at *6 (E.D.N.Y. Aug. 7, 2018) (citing *NLRB v. Cable Car Advertisers, Inc.*, 319 F. Supp. 2d 991, 999-1000 (N.D. Cal. 2004); *NLRB v. Graveley Bros. Roofing Corp.*, No. 98-3054, 1999 WL 1075117, at *1 (3d Cir. Jan. 14, 1999) (order of Magistrate

Judge appointed as special master); *NLRB v. Coughlin*, No. 04 MC 8, 2005 WL 850964, at *5 (S.D. Ill. Mar. 4, 2005); *NLRB v. A.G.F. Sports Ltd.*, No. 93 MC 049, 1994 WL 507779, at *1-2 (E.D.N.Y. June 22, 1994)).

Moreover, courts have long held that they possess the inherent authority to issue sanctions against parties for bad-faith behavior in litigation. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 46 (1991) (internal citation and quotation omitted) (court may sanction litigants who engage in “bad faith by delaying or disrupting the litigation or by hampering enforcement of a court order”). There is no good-faith justification for compelling the Board to file the instant application, and an award of fees is therefore appropriate.⁴

CONCLUSION

For the reasons set forth above, the Board respectfully requests that this Court enter an order enforcing its subpoenas by compelling

⁴ In the alternative, the court should consider whether sanctions against Alaris Hamilton’s counsel, David Jasinski, are appropriate under 28 U.S.C. § 1927 for unreasonably and vexatiously multiplying the proceedings in this matter. Jasinski’s failure to cause his client to comply with the subpoena has compelled the Board to file this application and expand its dispute from the Third Circuit to a new forum—thus literally satisfying the requirements of that statute.

Alaris Hamilton to produce to the Board the documents required by the subpoena duces tecum within 14 days of the date of the Court's order, and by compelling it to appear for deposition upon a date to be determined by the Board. Further, the Board requests that its costs and attorney fees be assessed against Alaris Hamilton, for which it should be granted leave to file a bill of costs and an itemized statement of attorney fees within 14 days of the deposition date, with any opposition to the bill due 14 days after that, and the NLRB's reply (if any) in support of its application due a further 7 days after filing of the opposition. A proposed order enforcing the subpoenas is enclosed with this motion.

Respectfully submitted,

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